Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM 1995

ESPERANZA RODRIGUEZ DE CASTRO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD WARE LEVITT
148 East 78th Street
New York, New York 10021
(212) 737-0400

Attorneys for Petitioner,
Esperanza Rodriguez de Castro

51 pp

QUESTIONS PRESENTED

1. For purposes of exercising *in rem* jurisdiction over foreign bank accounts seized by a foreign government in aid of an *in rem* civil forfeiture proceeding filed in United States District Court, is the District Court's requisite "control" of the *res* established by the mere possibility that the foreign government, within its own discretion, might repatriate a portion of the *res* should the foreign government confiscate the funds pursuant to a judgment of forfeiture obtained in the District Court?

2. If it appears that "control" of only a portion of the *res* has been established, may the District Court nonetheless exercise jurisdiction over the entirety of the *res*?

LIST OF PARTIES

The parties to this action are listed in the caption of the case.

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No. 95-_____

IN THE

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ESPERANZA RODRIGUEZ DE CASTRO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Esperanza Rodriguez de Castro respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit dated August 10, 1995. Rehearing was denied October 19, 1995.

CITATION OF OPINIONS BELOW

The opinion of the District Court is annexed at 1c and has been published. *United States v. All Funds*, 856 F.Supp. 759 (E.D.N.Y. 1994).

The opinion of the Second Circuit Court of Appeals is annexed at 1a and has been published. *United States v. All Funds*, 63 F.3d 148 (2d Cir. 1995).

STATEMENT OF JURISDICTION AND TIMELINESS

This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1). This Petition is being filed within 90 days of the circuit court's denial of Petitioner's Motion for Rehearing, dated October 19, 1995 (1b).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

28 U.S.C. § 1355 (b) provides:

(b)(1) A forfeiture action or proceeding may be brought in --

(A) the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred, or

(B) any other district where venue for the forfeiture action or proceeding is specifically provided for in section 1395 of this title or any other statute.

> (2) Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought as provided in paragraph (1), or in the United States District [C]ourt for the District of Columbia.

The Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Ireland Concerning the Investigation of Drug Trafficking Offenses and the Seizure and Forfeiture of Proceeds and Instrumentalities of Drug Trafficking, February 9, 1988, U.S.-U.K., 1989 WL 428726, ("Treaty") Article 10(1) provides:

> (1) To the extent permitted by their respective laws, the Parties shall assist each other in proceedings involving the freezing, seizure or forfeiture of the proceeds and instrumentalities of drug trafficking and in relation to proceedings involving the imposition of fines.

Article 10(3) of the Treaty provides:

> (3) A Requested Party in control of forfeited proceeds or instrumentalities shall dispose of them according to its laws. Either Party may transfer forfeited assets, or the proceeds of their sale to the other Party, to the extent permitted by their respective laws, upon such terms as may be agreed.

The Drug Trafficking Offenses Act (England & Wales), Schedule 3, § 12(7) provides:

> Any sums remaining after all the payments required to be made under the foregoing provisions of this section have been made shall be paid into the Consolidated Fund.

The Drug Trafficking Offenses Act (England & Wales), Schedule 3, § 26A (1) provides:

> On an application made by or on behalf of the government of a designated country, the High Court may register an external confiscation order made there if-
> (a) it is satisfied that at the time of registration the order is in force and not subject to appeal;
> (b) it is satisfied, where the person against whom the order is in force is made did not appear in the proceedings, that he received notice of the proceedings in sufficient time to enable him to defend them; and
> (c) it is of the opinion that enforcing the order in England and Wales would not be contrary to the interests of justice.

STATEMENT OF THE CASE

In July 1990, the United States government asked British authorities to restrain funds in various bank accounts in London, England, in anticipation of a criminal prosecution against alleged Colombian drug dealer Jose Santacruz Londoño. The request was made pursuant to (1) the Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Ireland Concerning the Investigation of Drug Trafficking Offenses and the Seizure and Forfeiture of Proceeds and Instrumentalities of Drug Trafficking, February 9, 1988, U.S.-U.K., 1989 WL 428726 (Treaty); and (2) the Drug Trafficking Offenses Act of 1986 (Designated Countries and Territories) Order 1990. The accounts, held in the name of claimant or her late husband, were alleged to be proceeds of Mr. Londoño's illicit activities. The request was granted, by order dated July 30, 1990, from England's High Court of Justice.

When the United States government's inability to bring Londoño to the United States to answer criminal charges became apparent, the instant action was commenced. To this end, the government filed a Verified Complaint *In Rem*, dated July 16, 1993, in the United States District Court for the Eastern District of New York, seeking forfeiture of these same bank accounts, under 18 U.S.C. § 981(a)(1)(A) and 21 U.S.C. § 881(a)(6). A

Warrant for Arrest of Article *In Rem* followed on July 19, 1993.

A Verified Notice of Claim was timely filed by claimant-appellant on October 1, 1993, followed by a Motion to Dismiss Verified Complaint *In Rem* on November 1, 1993. The Motion to Dismiss argued that the District Court lacked "control" of the seized funds sufficient to confer *in rem* jurisdiction on the District Court, because the funds, if eventually confiscated by England pursuant to a final judgment of forfeiture by the District Court, would be deposited into England's General Fund, and a portion (if anything at all) given to the United States at the sole discretion of the British authorities.

Proceedings in the district court were held in abeyance until parallel proceedings pending in the High Court of Justice in London, England, seeking vacatur of the 1990 restraint order, were concluded. Following entry of the High Court's Unrevised Judgment of March 18, 1994 denying vacatur, the district court denied Claimant's Motion to Dismiss, and ordered the case to proceed to trial. Claimant filed her Answer April 6, 1994. In lieu of responding to the government's interrogatories, however, Claimant informed the district court by a letter dated May 6, 1994 that she chose not to oppose the government's Motion for Summary Judgment on the Grounds of Collateral Estoppel, but preserved for appeal the issues raised in the district court. The District Court thereafter

filed a Final Judgment and Decree of Forfeiture on May 12, 1994, followed by an amended version of the same on May 17, 1994, and finally by a second amended version of the same on May 24, 1994. The District Court also issued a written opinion (1c). A timely appeal was filed in the United States Court of Appeals for the Second Circuit.

THE OPINIONS BELOW

A. The District Court's Opinion

The District Court, in a written opinion dated July 8, 1994, explained its reasons for finding that the Eastern District of New York exercised *in rem* jurisdiction of the subject bank accounts. The court agreed that it must exercise at least constructive control of the foreign *res* to have *in rem* jurisdiction,[1] but found such control to exist, by virtue of the assistance provided by Great Britain in aid of this proceeding:

> There is little doubt that Great Britain is cooperating with federal prosecutors. Thus, it may be deemed, for this purpose, to be acting as an agent of the United States, giving the lat[t]er and this court constructive possession. Seizure of the accounts in Great Britain with the assistance of the British

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1 Claimant did not contest that the district court properly exercised subject matter jurisdiction of the action and that venue was proper pursuant to the 1992 amendments to 28 U.S.C. § 1355.

> government gave this court constructive control over the defendant funds. The opinion of the English High Court gives assurance that a judgment of forfeiture issued by this court would be enforced in England.

(9c-10c).

B. The Circuit Court's Opinion

The Circuit Court affirmed the District Court's judgment. Along the way, it first rejected the government's argument that, under the amendments to 28 U.S.C. § 1355, control of a foreign *res* was not a requisite to *in rem* jurisdiction:

> Although Congress certainly intended to streamline civil forfeiture proceedings by amending § 1355, even with respect to property located in foreign countries, we do not believe that Congress intended to fundamentally alter well-settled law regarding *in rem* jurisdiction. The Supreme court has recently affirmed the rule that "'in order to institute and perfect proceedings *in rem* ... the thing should be actually or constructively within the reach of the Court.'" *United States v. James Daniel Good Real Property*, 114 S.Ct. 492, 503 (1993) (quoting *The Brig Ann*, 13 U.S. (9 Cranch) 289, 291 (1815)).

* * *

> ... Therefore, we conclude that in order to initiate a forfeiture proceeding against property located in a foreign country, the property must be within the actual or constructive control of the district court in which the action is commenced.

(10a-11a).

The court acknowledged that the applicable Treaty, read together with pertinent British Law, provided that, if and when a final judgment of the Eastern District of New York were registered and executed upon in the United Kingdom, "any net sums remaining after payment of certain specified sums 'shall be paid into the Consolidated Fund,' which is essentially a general treasury ... [and that] the United Kingdom has the power to retain any funds seized and that the amount that the United States will receive ultimately will depend on negotiations between the two nations" (12a-13a, *citing* The Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Ireland Concerning the Investigation of Drug Trafficking Offenses and the Seizure and Forfeiture of Proceeds and Instrumentalities of Drug Trafficking, February 9, 1988, U.S.-U.K., 1989 WL 428726 (Treaty), Arts. 10(1) and 10(3); Drug Trafficking Offenses Act, Schedule 3 § 12(7); *id.*, Schedule 3, § 26A). Nonetheless, the court concluded

that the district court "had constructive control of the funds by virtue of the demonstrated cooperation of the British government pursuant to the 1988 Treaty and the Drug Trafficking Offenses Act." (13a). This cooperation, said the court, included the issuance of the 1990 restraining order; the assistance of British law enforcement officials in serving copies of the forfeiture complaint and warrant on the subject banks; and the 1994 Order of the High Court continuing the restraining order (13a). The court also cited the government's representation on appeal that the British government, in at least two past instances, had turned over a portion of forfeited funds.

Based on the foregoing analysis, the Second Circuit concluded that "the United Kingdom acted essentially as an agent of the United States for purposes of this forfeiture action" and that the government had "met its burden of demonstrating that the British government will turn over at least a portion of the seized funds to the United States, thereby vesting the district court with the requisite constructive control of the funds" (14a).

REASONS FOR GRANTING THE WRIT

The instant Petition addresses bedrock principles of jurisdiction in the federal courts, concerning which this Court has shown a heightened interest of late. The serious and fundamental errors made by the lower courts in concluding that the district court enjoyed *in rem* jurisdiction

over the entirety of the subject accounts, when in fact it did not, demonstrates a continuing need for this Court to address issues of jurisdiction. This need is particularly acute because similar seizures of funds in foreign accounts will occur with increasing frequency, in light of the amendments of 28 U.S.C. § 1355 granting subject matter jurisdiction over forfeiture actions against property located outside the United States. Clarification is required regarding when a district court has "control" of foreign property sufficient to imbue it with *in rem* jurisdiction.

This Court has repeatedly affirmed that control of a *res* -- constructive or actual -- is a prerequisite to *in rem* jurisdiction in a forfeiture action. As stated most recently, in *United States v. James Daniel Good Real Property*, 114 S.Ct. 492 (1993), what is required "in order to institute and perfect proceedings *in rem*, [is] that the thing should be actually or constructively within the reach of the Court." *Id.* at 503, *quoting The Brig Ann*, 13 U.S. (9 Cranch) 289 (1915). A year previous, the Court said: "[c]ertainly, it long has been established that a valid seizure of the res is a prerequisite to the *initiation* of an *in rem* forfeiture proceeding." *Republic National Bank of Miami v. United States*, 113 S.Ct. 554 (1992).

The Court of Appeals acknowledged this principle, but found that "constructive control" of the bank accounts had been achieved because "the government has met its burden of demonstrating that the British government will

turn over at least a portion of the seized funds to the United States." (14a). This conclusion raises two distinct questions deserving of this Court's consideration. *First*, is constructive control of a *res* achieved where there exists merely a possibility that a foreign government will exercise its unreviewable discretion to repatriate a portion of the *res*? *Second*, if there exists a likelihood only that a *portion* of a *res* will be repatriated, does the district court nonetheless enjoy *in rem* jurisdiction of the *entire res*?

A. Constructive Control of the Bank Accounts did not Exist, in Whole or in Part.

The rulings of the courts below, that "constructive control" of the subject accounts exists, suggests that those courts applied a definition of "constructive control" entirely at odds with its traditional meaning. Constructive control, like constructive possession, exists "when a person ... knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others." *United States v. Gordils*, 962 F.2d 64, 71 (2d Cir. 1992). *See also United States v. Torres*, 901 F.2d 205, 243 (2d Cir. 1990) (concerning constructive possession of drugs); *United States v. Aiello*, 864 F.2d 257, 263 (2d Cir. 1988) ("constructive possession exists when a person ... knowingly has the power and the intention at a given time to exercise dominion and control over an object ..."). Similar principles apply in other areas of law, for example in bankruptcy jurisprudence, where the

test for constructive possession is "one of uninhibited control -- whether the one who holds the property does so subject to another's demand." *In Re Nat. Hosp. & Institutional Builders Co.*, 38 B.R. 727 (D.C. 1984). *See also Buss v. Long Island Storage Warehouse Co.*, 64 F.2d 338 (2d Cir. 1933).

Constructive control therefore exists where a court does not *presently* possess or control certain property, but nonetheless has the power to do so *at his or her discretion.* In no case of which we are aware has a court held that constructive control exists merely because another party, who *actually* controls the property, may, at his or her discretion, yield control to another.

Under the traditional definition of "constructive control," the District Court certainly lacked *in rem* jurisdiction. It had no ability to control the funds and therefore was entirely at the mercy of the British government. The conclusion by the Second Circuit that the requisite control exists is based on the following two propositions: (1) the various orders entered in this case by the British courts and law enforcement officials have been in direct response to requests from federal authorities; and (2) the British, on two previous occasions, have delivered a portion of confiscated funds to the United States. From these two propositions, the court concluded there was a likelihood that at least a portion of any confiscated proceeds

would be transferred from England's General Fund to the United States.

The first cited proposition provides no evidence at all supporting the conclusion that the District Court had constructive control of the funds, as the U.S. forfeiture proceedings are the *only* means by which a confiscation of these funds may eventually be achieved -- whether for the benefit of Britain, the United States, or both. Thus, whether the British intend to keep the funds all for themselves, or turn a portion over to the United States, it has no choice but to act in aid of the present forfeiture proceeding; such assistance therefore is as consistent with an intention of the British to confiscate the funds for their own use as for ours.

The Court of Appeals' reliance on two instances when the British have supposedly turned over a portion of confiscated proceeds to the United States was misplaced. No evidence in the record reflects the number of confiscations that have occurred in Britain versus the number of instances when money was repatriated. Thus, the existence of two such instances, in isolation, hardly supports the Second Circuit's conclusion that the government has "met its burden of demonstrating that the British government will turn over at least a portion of the seized funds to the United States." Indeed, the facts of these two cases are not even explicated in the record or in

the Second Circuit's opinion, so their usefulness in assessing Britain's intention in this case is non-existent.[2]

If the government were truly confident that a portion of the funds would be repatriated, the obvious route for the government to have followed would have been to seek written assurance from the British government that this would occur. The government's failure to make such efforts (or at least to bring them to Claimant's and the district court's attention) is far more revealing than the government's vague reliance on two hand-picked cases.

Rather than demonstrate that the district court enjoyed constructive control of the subject bank accounts, the evidence established that no such control existed. The Court of Appeals ruled to the contrary because it applied a definition of constructive control at odds with the meaning of that term, as interpreted both by this Court and by the lower courts.

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2 Further, the government made this representation without supporting citation to the record and it therefore should not have been before the court. Claimant explicitly objected to its use, Reply Brief at 4, n.3.

B. Assurance that a Portion of the Res would be Repatriated would, at Most, Support the District Court's In Rem Jurisdiction over that Portion Alone.

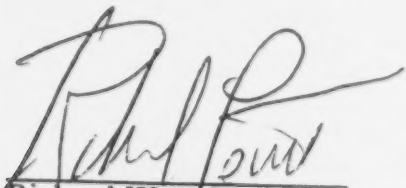
The Second Circuit found a likelihood that a *portion* of the seized moneys would be repatriated, but without explanation ruled that this likelihood permitted the district court to exercise *in rem* jurisdiction over *all* the funds. This conclusion finds no support either in logic or law. If, as both the district court and the Second Circuit agree, control of the *res* is a prerequisite to *in rem* jurisdiction, then such jurisdiction may exist only with respect to that property which in fact is controlled by the district court, either actually or constructively. The Second Circuit's opinion thus violates the very rule of jurisdiction it adopted in its decision, permitting the district court to exercise jurisdiction over substantial funds that by no theory were under the control -- actual or constructive -- of the District Court.

CONCLUSION

The issues presented here for review by this Court are likely to be raised often in the future, as more *in rem* forfeiture proceedings are brought against foreign property pursuant to the amendments to 28 U.S.C. § 1355. Accordingly, the need for an early resolution of this and related issues is great. We therefore respectfully request that this Petition for a Writ of Certiorari be granted.

Dated: New York, New York
January 11, 1996

Respectfully submitted,



Richard Ware Levitt
148 East 78th Street
New York, New York 10021
(212) 737-0400

Attorney for Petitioner
Esperanza Rodriguez
de Castro

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 966 August Term, 1994

(Argued: March 17, 1995 Decided: August 10, 1995)

Docket No. 94-6179

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-v-

ALL FUNDS ON DEPOSIT IN ANY ACCOUNTS MAINTAINED IN THE NAMES OF HERIBERTO CASTRO MEZA OR ESPRANZA RODRIGUEZ DE CASTRO AND ALL FUNDS TRACEABLE THERETO AT THE NATIONAL BANK OF GREECE, IN LONDON, ENGLAND, INCLUDING BUT NOT LIMITED TO ACCOUNT NO. 073679, AT MIDLAND BANK IN LONDON, ENGLAND, INCLUDING BUT NOT LIMITED TO ACCOUNT NOS. 69350040 AND 69358897, AT LLOYD'S BANK IN LONDON ENGLAND INCLUDING, BUT NOT LIMITED TO ACCOUNT REFERENCE NO. TSY2D048423, AT BANK OF CREDIT AND COMMERCE INTERNATIONAL (BCCI), IN LONDON, INCLUDING BUT NOT LIMITED TO ACCOUNTS NOS. 03062866 AND 01160156 AND DRESDNER BANK IN LONDON, ENGLAND INCLUDING BUT NOT LIMITED TO ACCOUNT NO. 257692.

Defendants,

ESPRANZA RODRIGUEZ DE CASTRO,

Claimant-Appellant.

BEFORE: OAKES, CARDAMONE and ALTIMARI,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Weinstein, *J.*), granting the government's motion for summary judgment in a civil forfeiture action against funds on deposit in certain bank accounts in London, England, in which claimant-appellant Esperanza Rodriguez de Castro held a possessory interest.

Affirmed.

RICHARD W. LEVITT, New York, New York (Robert I. Targ, South Miami, Florida, on the brief), *for claimant-appellant*.

JENNIFER C. BOAL, Assistant United States Attorney, Eastern District Of New York, Brooklyn, New York (Zachary W. Carter, United States Attorney, Deborah B. Zwany, Gary B. Brown, Arthur P. Hui, Assistant United States Attorneys, on the brief), *for plaintiff-appellee*.

ALTIMARI, *Circuit Judge*:

Claimant-appellant Esperanza Rodriguez de Castro ("claimant") appeals from a judgment of the United States District Court for the Eastern District of New York (Weinstein, J.), granting the government's motion for summary judgment in a civil forfeiture action against funds on deposit in claimant's name in certain bank accounts in London, England (the "funds"). Claimant did not contest that the funds were proceeds of narcotics trafficking or money laundering activities occurring in part in the

Eastern District, but did contend that the district court lacked *in rem* jurisdiction because of the absence of either actual or constructive control of the funds. The district court concluded that it had constructive control of the funds because of the demonstrated cooperation between the United States and the United Kingdom, including the seizure of the funds by British authorities pursuant to a restraining order and a subsequent judicial ruling upholding that order. *See United States v. All Funds on Deposit in Any Accounts Maintained in the Names of Mesa or de Castro*, 856 F. Supp. 759, 763 (E.D.N.Y. 1994). Because we agree that the district court exercised the required constructive control over the funds, we affirm its judgment.

BACKGROUND

In this civil forfeiture action, federal authorities targeted funds in several bank accounts at various financial institutions in London, England, all in the name of claimant or Heriberto Castro Meza, her late husband. The funds allegedly represented proceeds of an international drug trafficking and money laundering operation spearheaded by Jose Santacruz Londoño ("Londoño"), claimant's son-in-law and a leader of the Cali Cartel, who is currently a fugitive from justice in the United States believed to be residing in Colombia. Claimant is also a foreign national residing in Colombia. A significant amount of the trafficking and laundering occurred in the Eastern District of New York.

In July 1990, the government, through the Criminal Division of the Department of Justice, asked British authorities to restrain the funds based on its anticipated criminal prosecution of Londoño and others and its corresponding criminal forfeiture proceeding against the funds in the Eastern District of New York.

The government requested seizure of the funds pursuant to (1) the Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning the Investigation of Drug Trafficking Offenses and the Seizure and Forfeiture of Proceeds and Instrumentalities of Drug Trafficking, February 9, 1988, U.S.-U.K., 1989 WL 428726 (Treaty) (the "1988 Treaty"), and (2) the Drug Trafficking Offenses Act of 1986 (Designated Countries and Territories) Order 1990 (the "Drug Trafficking Offenses Act"). The British authorities cooperated and obtained an order dated July 30, 1990, from England's High Court of Justice, Queen's Bench Division, restraining the accounts (the "1990 High Court restraining order").

The United States government continued its efforts to prosecute Londoño, but he remained a fugitive. In 1991, extradition arrangements between the United States and Colombia were terminated, rendering the prospect of trying Londoño in this country highly unlikely.

On July 16, 1993, the government filed a complaint in the United States District Court for the Eastern District seeking civil forfeiture of the funds. On the same date, Chief Magistrate Judge Chrein executed an order directing the issuance of an arrest warrant *in rem* for the funds, which was issued on July 19. On September 8 and 16, 1993, a British constable, at the request of the United States Marshals Service, served the warrant and complaint on the various banks holding the funds, thereby attaching the funds for purposes of this action. At that time, the funds remained subject to the 1990 High Court restraining order.

On November 1, 1993, one month after filing a notice of claim to the funds, claimant moved in the district court to dismiss

the complaint on the ground that the district court lacked *in rem* jurisdiction over the funds. Claimant asserted the district court lacked constructive control over the funds, in part because any forfeited funds would be deposited in the general fund of the United Kingdom. Simultaneously, claimant and her daughter (Londoño's former wife) commenced an action in the High Court of Justice, Crown Office Division, seeking to discharge the 1990 High Court restraining order. In that action, claimant argued, among other things, that a restraining order could not continue based on a pending civil *in rem* forfeiture proceeding. The district court deferred its decision on claimant's motion to dismiss pending resolution of the British action, given that a resolution favorable to claimant might divest the district court of its jurisdiction. While the British action was pending, the district court issued a temporary restraining order and preliminary injunction prohibiting claimant from transferring the funds, and further issued an order authorizing the release of $100,000 of the funds to pay for claimant's legal expenses.

On March 18, 1994, the High Court issued a judgment upholding the 1990 High Court restraining order, claimant's appeal from which is currently pending. Shortly thereafter, the district court denied claimant's motion to dismiss and ordered the case to proceed to trial. Subsequently, claimant failed to comply with a court order demanding interrogatory answers and documents, at which time the government moved for summary judgment on the ground that claimant was collaterally estopped by a related action from contesting issues of probable cause or innocent ownership of the funds. Claimant did not oppose the government's motion.

The district court entered a Second Amended Final Judgment on May 25, 1994, granting summary judgment for the

government based upon collateral estoppel. *See generally United States v. All Funds on Deposit in Any Accounts Maintained at Merrill Lynch, Pierce Fenner & Smith*, 801 F. Supp. 984 (E.D.N.Y. 1992) (related action in which funds derived from the same source as funds in this action were deemed proceeds of drug trafficking and money laundering), *aff'd sub nom. United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1294 (1994). Accordingly, the district court ordered forfeiture of the funds pursuant to 18 U.S.C. § 981(a)(1)(A) and 21 U.S.C. § 881(a)(6), and directed the Marshals Service to dispose of the funds "in accordance with all applicable laws, regulations, treaties and mutual legal assistance agreements."

On July 8, 1994, the district court issued a Memorandum and Order explaining its earlier denial of claimant's motion to dismiss for lack of *in rem* jurisdiction. *See United States v. All Funds*, 856 F. Supp. 759 (E.D.N.Y. 1994). The district court first concluded that it had subject matter jurisdiction over the action and that venue was proper pursuant to the 1992 amendments to 28 U.S.C. § 1355. The district court then separately addressed *in rem* jurisdiction, holding that it needed actual or constructive control of the funds to maintain the forfeiture action. More specifically, the district court held that *in rem* jurisdiction exists over property in a foreign country "if there is a seizure of the property that gives the court constructive control over the property, and if the seizure satisfies the traditional concerns of jurisdiction, namely enforceability of the judgment and reasonable probability of notice to the parties interested in the property." *Id.* at 763. Applying this standard, the district court concluded that it had constructive control of the accounts because of (1) the 1990 High Court restraining order issued solely in response to a request by federal authorities; (2)

the 1994 High Court judgment affirming the restraining order; and (3) the general cooperation of the British authorities. *Id.*

Claimant now appeals from the Second Amended Final Judgment granting the government's motion for summary judgment.

DISCUSSION

Claimant's principal argument on appeal is that the district court lacked *in rem* jurisdiction because it had neither actual nor constructive control of the funds. The fact that British authorities were cooperating with the United States government was insufficient, according to claimant, to afford the district court the required constructive control because the British authorities were not bound to remit the seized proceeds to the United States, even if the district court ordered forfeiture.

1. Control under 28 U.S.C. § 1355

Before addressing claimant's argument, we address the government's threshold contention that, based on recent amendments to 28 U.S.C. § 1355, *in rem* jurisdiction is no longer required in actions seeking forfeiture of property located in a foreign country. The government asserts that "[b]ecause subject matter jurisdiction and venue are appropriate in the Eastern District of New York, the question of *in rem* jurisdiction becomes moot." Consideration of this argument requires a brief analysis of the development of § 1355.

Prior to 1992, § 1355 simply provided that district courts had subject matter jurisdiction over forfeiture proceedings commenced pursuant to the laws of the United States. It did not, however, authorize a district court to issue process against

property not within its district. This limitation hindered the effectiveness of the forfeiture laws, as some courts concluded that district courts lacked *in rem* jurisdiction in actions where the property was located within the United States but outside the district in which the forfeiture action was brought. *See United States v. Contents of Accounts Nos. 3034504504 and 144-07143*, 971 F.2d 974, 983 (3d Cir. 1992) (although forfeiture statutes provide for venue and subject matter jurisdiction, district court lacks *in rem* jurisdiction over property located in another district because service of process cannot be effected outside of the state in which the district is located), *cert. denied*, 113 S. Ct. 1580 (1993); *see also United States v. 51 Pieces of Real Property, Roswell, N.M.*, 17 F.3d 1306, 1310 (10th Cir. 1994) ("To obtain jurisdiction over the property, the court must be able to execute service of process on it."). As a result, the government often had to file multiple forfeiture actions in different districts to satisfy these jurisdictional requirements.

In response to this shortcoming, Congress substantially amended § 1355 in 1992. *See generally United States v. One 1978 Piper Cherokee Aircraft*, 37 F.3d 489, 492 (9th Cir. 1994) (1992 amendments "unif[ied] the treatment of jurisdiction, venue and authority to serve process in civil forfeiture cases"). Section 1355(b) addresses venue in forfeiture actions, including proceedings against property located outside the United States:

> (b)(1) A forfeiture action or proceeding may be brought in–
>
> > (A) the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred, or
> >
> > (B) any other district where venue for the forfeiture action or proceeding is specifically

> provided for in section 1395 of this title or any other statute.
>
> (2) Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought as provided in paragraph (1), or in the United States District [C]ourt for the District of Columbia.

In response to the inability of a district court to effect service outside of its state's borders, Congress enacted § 1355(d), which provides that a district court "with jurisdiction over a forfeiture action pursuant to subsection (b) may issue and cause to be served in any other district such process as may be required to bring before the court the property that is the subject of the forfeiture action." This national service of process provision clearly conferred *in rem* jurisdiction on district courts in forfeiture proceedings with respect to property located within another judicial district in the United States. *See United States v. $633,021.67*, 842 F. Supp. 528, 531-32 (N.D. Ga. 1993); *United States v. Contents of Account No. 2033301*, 831 F. Supp. 337, 340 (S.D.N.Y. 1993). Prior to the district court's decision in the instant case, however, no published opinion had applied § 1355 to property located in a foreign country.

As noted above, the government argues that § 1355 as amended obviates the need for a district court to exercise any degree of control over property in order to sustain a forfeiture proceeding. It relies chiefly on the Senate Report in the legislative history regarding § 1355(b)(2), which states:

> [I]t is probably no longer necessary to base *in rem* jurisdiction on the location of the property if there have been sufficient contacts with the district in which the suit

> is filed. No statute, however, says this, and the issue has to be repeatedly litigated whenever a foreign government is willing to give effect to a forfeiture order issued by a United States court and turn over seized property to the United States if only the United States is able to obtain such order.

137 Cong. Rec. S16643 (1992) (citation omitted). According to the government, the only relevant inquiry under § 1355 is whether any of the conduct giving rise to the forfeiture proceeding occurred in the district in which the action was commenced, even if the property is located in a foreign country.

We reject this argument. Although Congress certainly intended to streamline civil forfeiture proceedings by amending § 1355, even with respect to property located in foreign countries, we do not believe that Congress intended to fundamentally alter well-settled law regarding *in rem* jurisdiction. The Supreme Court has recently affirmed the rule that "'in order to institute and perfect proceedings *in rem*, . . . the thing should be actually or constructively within the reach of the Court.'" *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 503 (1993) (quoting *The Brig Ann*, 13 U.S. (9 Cranch) 289, 291 (1815)). *See also Republic Nat'l Bank of Miami v. United States*, 113 S. Ct. 554, 559 (1992) ("the court must have actual or constructive control of the res when an *in rem* forfeiture suit is initiated"). This control is required in addition to the requirements of subject matter jurisdiction and venue. *See, e.g., 51 Parcels of Real Property Roswell, N.M.*, 17 F.3d at 1310 ("Even if a district is the proper venue for a civil forfeiture action, the court cannot proceed unless it has jurisdiction over the defendant property."); *Contents of Accounts Nos. 3034504504 and 144-07143*, 971 F.2d at 980-81 (subject matter jurisdiction and venue are distinct from ability of court to serve process on property).

As noted above, by allowing nationwide service of process, newly adopted § 1355(d) clearly provides districts courts with the required control over property located within the United States. Absent any degree of control over property located in a foreign country, however, a district court's forfeiture order directed against such property would be wholly unenforceable. *See, e.g.*, David B. Smith, 1 Prosecution and Defense of Forfeiture Cases § 9.01[1], at 9-5 n.8 ("It could be argued based on the legislative history that Congress intended [§ 1355(b)(2)] to operate only when a foreign government is willing to give effect to a forfeiture order issued by a United States court and turn over seized property . . . [as t]hat is the only circumstance in which an American court could be said to have enough control over the property to direct its disposition."). Therefore, we conclude that in order to initiate a forfeiture proceeding against property located in a foreign country, the property must be within the actual or constructive control of the district court in which the action is commenced.

We next consider whether the district court in the instant case properly concluded that it had such control.

2. Control over the Funds

The district court concluded that it had constructive control of the funds based on (1) the 1990 High Court restraining order (which was issued solely because of a request from federal authorities), (2) the 1994 High Court judgment affirming the restraining order, and (3) the general cooperation of the British authorities with respect to the funds. As the district court stated, "[s]eizure of the accounts in Great Britain with the assistance of the British government gave this court constructive control over the defendant funds. The opinion of the English High Court

gives assurance that a judgment of forfeiture issued by this court would be enforced in England." 856 F. Supp. at 763.

Claimant argues that the district court lacked any degree of control because the United Kingdom was not obliged to remit to the United States the funds seized. The extent to which the United Kingdom may have cooperated in past forfeiture proceedings and expressed a clear intention to cooperate in this action is irrelevant, according to claimant, absent a legal entitlement of the United States to the funds, either pursuant to British law or a bilateral treaty. Constructive control would exist only "[h]ad the applicable law *required* that a portion of any confiscated proceeds be transferred to the United States."

As claimant correctly points out, the United Kingdom is not bound to remit to the United States any funds seized in connection with and in support of a forfeiture proceeding in this country. Pursuant to a mutual assistance treaty, the two countries have agreed to "assist each other in proceedings involving the freezing, seizure or forfeiture of the proceeds and instrumentalities of drug trafficking . . . ." 1988 Treaty, Art. 10(1). Under the Treaty, a party "in control of forfeited proceeds or instrumentalities shall dispose of them according to its laws. Either Party may transfer forfeited assets . . . to the other party, to the extent permitted by their respective laws . . . ." *Id.* at Art. 10(3). Under British law, if and when an "external confiscation order" of a district court is registered and executed upon in the United Kingdom, any net sums remaining after the payment of certain specified sums "shall be paid into the Consolidated Fund," which is essentially a general treasury. *See* Drug Trafficking Offenses Act, Schedule 3, § 12(7); *see also id.*, Schedule 3, § 26A. The government conceded at oral argument that the United Kingdom has the power to retain any funds seized and that the

amount that the United States will receive ultimately will depend on negotiations between the two nations.

Notwithstanding the absence of a binding obligation on the part of the United Kingdom, we conclude that the district court correctly determined that it had constructive control of the funds by virtue of the demonstrated cooperation of the British government pursuant to the 1988 Treaty and the Drug Trafficking Offenses Act. As noted above, in 1990 the High Court issued a restraining order freezing the funds based solely on a request by the United States. *See generally* Drug Trafficking Offenses Act, Schedule 3, § 13(2) (High Court's authority to restrain assets "shall be exercised with a view to recovering property which is liable to be recovered under an external confiscation order . . . or . . . with a view to making available for recovery property which may become liable to be recovered under any external confiscation order which may be made in the defendant's case"). Subsequently, in September 1993, at the request of the Marshals Service, British law enforcement officials served copies of the forfeiture complaint and warrant on those banks holding the funds. Furthermore, the 1990 High Court restraining order was continued by the High Court in 1994.

As the district court noted, the United Kingdom acted essentially as an agent of the United States for purposes of this forfeiture action. Every action of the British law enforcement officials has been in direct response to requests from federal authorities. Moreover, the government indicates that in at least two other separate proceedings, the United Kingdom has returned funds to the United States after registering and enforcing decrees of forfeiture entered by a district court.

We decline to adopt claimant's unduly narrow interpretation of constructive control, under which this history of demonstrated cooperation would be irrelevant, absent a binding obligation on the part of the United Kingdom to return the funds.

In summary, although we do not today delineate the precise scope of what will constitute constructive control in future cases, we are satisfied that in the instant case the government has met its burden of demonstrating that the British government will turn over at least a portion of the seized funds to the United States, thereby vesting the district court with the requisite constructive control over the funds. *See, e.g.*, Smith, § 9.01[1] at 9-5 n.8 ("If jurisdiction is challenged, the government should have the burden of showing that a forfeiture order will be enforced by the foreign government."). Accordingly, the district court properly asserted *in rem* jurisdiction in the instant case.

CONCLUSION

Based on the foregoing, we affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York on the 19 day of October one thousand nine hundred and ninety-five.

USA

v Docket No. 94-6179

All Funds

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant ESPERANZA RODRIGUEZ DE CASTRO

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is Further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III

By: /s/
Beth J. Meador,
Administrative Attorney

p o ccc
inbancdn_frm

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

Plaintiff — MEMORANDUM

-against- — 93 Cv. 3168(JBW)

ALL FUNDS ON DEPOSIT IN ANY ACCOUNTS MAINTAINED IN THE NAMES OF HERIBERTO CASTRO MEZA OR ESPRANZA RODRIGUEZ DE CASTRO AND ALL FUNDS TRACEABLE THERETO AT THE NATIONAL BANK OF GREECE, IN LONDON, ENGLAND, INCLUDING BUT NOT LIMITED TO ACCOUNT NO. 073679, AT MIDLAND BANK IN LONDON, ENGLAND, INCLUDING BUT NOT LIMITED TO ACCOUNT NOS. 69350040 AND 69358897, AT LLOYD'S BANK IN LONDON ENGLAND INCLUDING, BUT NOT LIMITED TO ACCOUNT REFERENCE NO. TSY2D048423, AT BANK OF CREDIT AND COMMERCE INTERNATIONAL (BCCI), IN LONDON, INCLUDING BUT NOT LIMITED TO ACCOUNTS NOS. 03062866 AND 01160156 AND DRESDNER BANK IN LONDON, ENGLAND INCLUDING BUT NOT LIMITED TO ACCOUNT NO. 257692,

Defendants.

----------X

APPEARANCES

For the United States:

Zachary W. Carter
United States Attorney
225 Cadman Plaza East
Brooklyn, New York 11201
By Jennifer C. Boal, Esq. Gary R. Brown, Esq.
Arthur P. Hui, Esq.

For the Claimant Esperanza Rodriguez De Castro:

Richard Ware Levitt, Esq.
148 East 78th Street
New York, NY 10021

Robert I. Targ, Esq.
7600 South Red Road, Suite 200
South Miami, FL 33143-5408

Weinstein, J.:

Claimant Esperanza Rodriguez De Castro ("Castro"), individually and on behalf of the estate of Heriberto Castro Meza, moves to dismiss this civil forfeiture action against bank accounts in London, England, contending that this court lacks in rem jurisdiction. Because this court has the requisite control over the bank accounts, the motion is denied.

Facts

The complaint in this case alleges that Jose Santacruz Londoño ("Santacruz") and individuals working with him operate extensive international drug trafficking and money laundering enterprises, involving millions of dollars and multi-kilogram shipments of cocaine smuggled into the United States and distributed in the Eastern District of New York and elsewhere. It also alleges that in order to facilitate these activities the Santacruz organization engages in large-scale financial transactions involving the transfer of substantial sums of money to accounts in the United Kingdom, including the defendant accounts.

The defendant accounts were opened in the names of Heriberto Castro Mesa and Esperanza Rodriguez De Castro, the father-in-law and mother-in-law of Santacruz. The complaint

alleges that the accounts were controlled by a member of the Santacruz organization, Franklin Jurado. Jurado was arrested in Luxembourg in June, 1990 for laundering of drug money. In connection with his arrest and the arrest of other money launderers in the Santacruz organization, tens of millions of dollars of alleged drug and money laundering proceeds were frozen in bank accounts worldwide, including $12 million that was forfeited in *United States v. All Funds*, 801 F. Supp. 984 (E.D.N.Y. 1992), *aff'd sub nom., United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 1294 (1994).

On July 12, 1990, the United States Department of Justice sent a request to the Central Authority of the United Kingdom pursuant to the Agreement between the United States and the United Kingdom Concerning the Investigation of Drug Trafficking Offenses and the Seizure and Forfeiture of Proceeds and Instrumentalities of Drug Trafficking, signed at London, February 9, 1988 and the Drug Trafficking and Offenses Act of 1986. It requested the Central Authority to seek a restraint of the defendant bank accounts based on the Justice Department's investigation of the Santacruz organization. The request indicated that a criminal prosecution in the United States of Santacruz was imminent, and that the defendant accounts would be subject to a corresponding criminal forfeiture. Cooperating, the Crown Prosecution Service obtained an order from the High Court of England and Wales restraining the defendant accounts.

In October 1990, a criminal complaint was filed in the Eastern District of New York against Santacruz charging him with conspiracy to distribute cocaine and conspiracy to launder narcotics proceeds. He has been a fugitive since that time. The government believes he now is in Cali, Colombia. In 1991, extradition arrangements between Colombia and the United States

were terminated. It is thus unlikely that Santacruz will ever be tried in the United States.

On July 16, 1993 the instant civil forfeiture action was instituted against the defendant bank accounts in England. On the same date, Chief Magistrate Judge Chrein executed an order directing the Clerk of the Court to issue a warrant of arrest in rem pursuant to Rule C(3) of the Supplemental Rules for Certain Admiralty and Maritime Claims. On July 19, 1993, the Clerk issued a warrant commanding the United States Marshal to attach the defendant accounts. On September 8 and 16, 1993, Martin Comley, a Detective Constable in the United Kingdom, at the request of the United States Marshal served copies of the Warrant and Verified Complaint on the banks holding the defendant accounts in England.

On November 1, 1993, claimant Castro filed a motion to dismiss this action claiming that the Court lacks in rem jurisdiction over the defendant accounts. On March 2, 1994, this court was informed that the claimant Castro had petitioned the High Court of England, asking that its July 30, 1990 order restraining the defendant accounts be discharged on the ground that the order assumed that the forfeiture proceeding in the United States would be an in personam proceeding accompanying a criminal prosecution, not a civil, in rem forfeiture. This court stayed proceedings pending a decision by the court in England.

On March 18, 1994, the High Court of England issued judgment, holding that "although now based on the civil proceedings in New York, the order will remain in force." *J.L. and In the Matter of the Drug Trafficking Offenses Act 1986 (Designated Countries and Territories) Order 1990*, at 10 (High Court of Justice March 18, 1994).

Law

A. Subject Matter Jurisdiction and Venue

In forfeiture cases, venue has traditionally only been proper in the judicial district in which the property to be forfeited is found. *See. e.g.*, 28 U.S.C. § 1395(b) ("A civil proceeding for the forfeiture of property may be prosecuted in any district where such property is found.") *See also United States v. Contents of Account No. 2033301*, 831 F. Supp. 337, 33839 (S.D.N.Y. 1993). In order for a court to have venue over property outside the United States, the property had to be physically brought into the district. *See, e.g.*, 28 U.S.C. 1395(c) ("A civil proceeding for the forfeiture of property seized outside any judicial district may be prosecuted in any judicial district into which the property is brought.") *See also*, *United States v. One Caribou Aircraft Registration No. N-1017-H*, 557 F. Supp. 379, 381 (D.P.R. 1983).

Congress, in the last several years, has expanded the forfeiture laws. 18 U.S.C. § 881(j) and § 981(h) both state that venue for a civil forfeiture proceeding is proper in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought. *See United States v. Contents of Accounts Nos. 3034504504 and 144-07143*, 971 F.2d 974, 979 (3d Cir. 1992), *cert. denied*, 113 S.Ct. 1580 (1993); *United States v. 51 Pieces of Real Property Roswell, N.M.*, 17 F.3d 1306, 1311 (10th Cir. 1994). In addition, in October, 1992, Congress amended 28 U.S.C. § 1355(b) to give subject matter jurisdiction and venue to district courts over forfeiture cases in which *any* of the acts or omissions giving rise to the forfeiture occurred in the district, even if the property is located in a foreign country. Section 1355 now reads:

(b)(1) A forfeiture action or proceeding may be brought in

(A) the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred, or

(B) any other district where venue for the forfeiture action or proceeding is specifically provided for in section 1395 of this title or any other statute.

(2) Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought as provided in paragraph (1), or in the United States District [C]ourt for the District of Columbia.

B. In Rem Jurisdiction

The issue of in rem jurisdiction over the defendant property is separate from subject matter jurisdiction and venue. *See United States v. Contents of Accounts Nos. 3034504504 and 144-07143*, 971 F.2d at 980. After 18 U.S.C. §§ 881(j) and 981(h) were enacted expanding venue, the Third Circuit found that although the new statutes conferred venue on district courts for forfeitures outside the judicial district, the courts did not have in rem jurisdiction over the property because they had no means by which to order an arrest of the property. *Id.* at 983. *See also United States v. 51 Pieces of Real Property Roswell, N.M.*, 17 F.3d at 1311 (following the Third Circuit case): Service of process was only available under Fed.R.Civ.P. 4(f), which allows for service anywhere within the territorial limits of the state in which the district court is located, and Fed.R.Civ.P. 4(e), which allows for service under any statute of the state within which the district court sits. *Id.* at 981.

In response, when Congress amended § 1355, it included a provision for nationwide service of process, § 1355(d), which states:

> Any court with jurisdiction over a forfeiture action pursuant to subsection (b) may issue and cause to be served in any other district such process as may be required to bring before the court the property that is the subject of the forfeiture action.

The purpose of this provision was to clarify that Congress intended to confer in rem jurisdiction to district courts which had venue pursuant to § 1355 (b). *See United States v. Contents of Account No. 2033301*, 831 F. Supp. at 339 (citing 137 Cong. Rec. S16640, *S16642 (Nov. 13, 1991) (statement of Sen. D'Amato)). Courts have found that this provision indeed confers in rem jurisdiction in such cases. *See. e.g., United States v. $633,021.67*, 842 F. Supp. 528, 530-32 (N.D.Ga. 1993); *United States v. Contents of Account No. 2033301*, 831 F. Supp. at 339; *United States v. One 1990 Lincoln Town Car*, 817 F. Supp. 1575, 1577-78 (N.D. Ga. 1993).

A search of the cases finds no published opinion on the forfeiture of property located outside the United States. The government has, however, brought to the court's attention an unpublished case in the Middle District of Florida, *United States v. Certain Funds in Hong Kong. et al.*, No. CV 91-598 (M.D. Fla. 1993), in which the court ordered a final judgment of forfeiture against property located in Hong Kong after the government proved that the funds had been seized by competent authority of the sovereign of the site of the funds.

The Supreme Court has stated in two recent forfeiture cases that a court must have actual or constructive control of the res when an in rem forfeiture action is initiated. *United States v.*

James Daniel Good Real Property, 114 S.Ct. 492, 503 (1993); *Republic Nat. Bank of Miami v. United States*, 113 S.Ct. 554, 559 (1992). For this proposition, both cases cite to *The Brig Ann*, 13 U.S. (9 Cranch) 289 (1815). This case states that property "is actually within [a court's] possession when it is submitted to the process of the Court; it is constructively so, when, by a seizure, it is held to ascertain and enforce a right or forfeiture which can alone be decided by a judicial decree in rem." *Id.* at 291.

The Court in *Republic Nat. Bank of Miami* stated that, "it long has been understood that a valid seizure of the res is a prerequisite to the *initiation* of an *in rem* civil forfeiture proceeding." *Republic Nat. Bank of Miami*, 113 S.Ct. at 557 (emphasis in the original). The Court explained, the "'seizure of the RES, and publication of the monition or invitation to appear is regarded as equivalent to the particular service of process in law and equity."' *Id.* at 557-58 (quoting *Taylor v. Caryl*, 61 U.S. (20 How.) 583, 559 (1858)).

Extra-territorial jurisdiction over property is consistent with Western law. *See Derby & Co. v. Weldon*, Ch 48, 57, per Parker L.J. (Court of Appeal of England 1990)(enjoining assets outside of England); *Republic of Haiti v. Duvalier*, 2 WLR 261 (Court of Appeal of England 1989)(same). *See also* Phillip H. Pettit, *The Onward March of Mareva and Anton Pillar Injunctions*, in *Equity and Contemporary Leqal Developments* (Stephen Goldstein, ed. 1990) (First International Conference on Equity, The Hebrew University of Jerusalem, June 1990), Helene Pines Richman, *The London Letter: 'Mareva' Injunction: Important Tactical Tool*, N.Y.L.J., July 7, 1994 at 2.

In rem jurisdiction over property in a foreign country exists if there is a seizure of the property that gives the court constructive control over the property, and if the seizure satisfies the traditional concerns of jurisdiction, namely enforceability of the judgment and reasonable probability of notice to the parties interested in the property. *Cf. Republic Nat. Bank of Miami*, 113 S.Ct. at 559.

Application of Law to Fact

It is undisputed that this court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1355(b)(2) and that venue is proper. Relevant acts involving drugs by the Santacruz organization giving rise to the forfeiture allegedly took place in the Eastern District of New York.

The open question is whether this court has jurisdiction over the property. At the time this forfeiture action was initiated, the defendant property was seized by order of the High Court of England for the sole purpose of restraining the property pending a forfeiture proceeding in the United States. This order was clarified by the revised judgment issued by the High Court explicitly stating that the accounts in England were being restrained pending the outcome of this civil forfeiture action.

There is little doubt that Great Britain is cooperating with federal prosecutors. Thus, it may be deemed, for this purpose, to be acting as an agent of the United States, giving the later and this court constructive possession. Seizure of the accounts in Great Britain with the assistance of the British government gave this court constructive control over the defendant funds. The opinion of the English High Court gives assurance that a

judgment of forfeiture issued by this court would be enforced in England.

Notice of this action was served on the property by English officials at the behest of the United States Department of Justice. Claimants do not assert that notice was unreasonable or otherwise deficient.

Conclusion

This court has jurisdiction over the defendant bank accounts. Claimant's motion to dismiss is denied.

SO ORDERED

/s/
Jack B. Weinstein
United States District Judge

Dated: Brooklyn, Nev York
July 8, 1994

Supreme Court, U.S.
FILED
MAR 18 1996
CLERK

No. 95-1134

In the Supreme Court of the United States

OCTOBER TERM, 1995

ESPERANZA RODRIGUEZ DE CASTRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district court had *in rem* jurisdiction in a civil forfeiture action over funds in accounts at financial institutions in London, England, when those funds had been seized by British authorities at the request of the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1134

ESPERANZA RODRIGUEZ DE CASTRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 63 F.3d 148. The opinion of the district court (Pet. App. 1c-10c) is reported at 856 F. Supp. 759.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1995. A petition for rehearing was denied on October 19, 1995. Pet. App. 1b. The petition for a writ of certiorari was filed on January 16, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In July 1993, the United States filed an *in rem* action in the United States District Court for the Eastern District of New York seeking civil forfeiture pursuant to 18 U.S.C 981(a)(1)(A) and 21 U.S.C. 881(a)(6) of funds in seven bank accounts at financial institutions in London, England, in the names of petitioner and her late husband. The complaint alleged that the funds in the bank accounts were the proceeds of an extensive international drug-trafficking and money-laundering enterprise operated by the Cali Cartel and headed by petitioner's son-in-law, Jose Santa Cruz Londoño. The district court denied petitioner's motion to dismiss the forfeiture action for lack of *in rem* jurisdiction and later entered an order forfeiting the funds. Pet. App. 1c-10c; Pet. C.A. Br. App. A14-A15. The court of appeals affirmed. Pet. App. 1a-14a.

1. In July 1990, the United States asked British authorities to restrain funds in seven London bank accounts controlled by Londoño in light of the anticipated federal criminal prosecution of Londoño and his associates in the United States. The request was based on a 1988 mutual assistance treaty between the United States and the United Kingdom[1] and the

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[1] Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning the Investigation of Drug Trafficking Offences and the Seizure and Forfeiture of Proceeds and Instrumentalities of Drug Trafficking, Feb. 9, 1988, 1989 WL 428726 (Treaty).

applicable British forfeiture statute.[2] On July 30, 1990, the British authorities obtained an order restraining the bank accounts from the Queen's Bench Division of the High Court of Justice. Pet. App. 3a-4a; Gov't C.A. Br. 10.

In October 1990, a criminal complaint was filed in the United States District Court for the Eastern District of New York charging Londoño and three others with conspiring to distribute cocaine and conspiring to launder drug proceeds. Londoño, however, remained a fugitive, living, it was believed, in Columbia. In 1991, extradition arrangements between the United States and Colombia ended, making it unlikely that Londoño would be tried in this country on the federal charges. Pet. App. 4a, 3c-4c; Gov't C.A. Br. 10.

2. On July 16, 1993, the government filed the civil forfeiture complaint in this case in the Eastern District of New York. On July 19, 1993, pursuant to a magistrate judge's order, the clerk of the court issued an arrest warrant *in rem* commanding the U.S. Marshals Service to attach the funds in the seven bank accounts. At the request of the U.S. Marshals Service, a British constable in London attached the funds on September 8 and 16, 1993, by serving the complaint and warrant on the banks holding the funds. Pet. App. 4a; Gov't C.A. Br. 10-11.

On October 1, 1993, petitioner, a foreign national residing in Colombia, filed a notice of claim to the funds in the seven bank accounts. One month later, she moved to dismiss the forfeiture complaint on the

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[2] Drug Trafficking Offences Act, 1986, ch. 32 (Eng.) (Designated Countries and Territories), reproduced in Pet. C.A. Br. App. A50-A82.

ground that the district court lacked *in rem* jurisdiction over the funds. Petitioner asserted that the district court lacked actual or constructive control over the funds in the London bank accounts because any forfeited funds would be deposited into the general fund of the United Kingdom pursuant to th 1988 treaty and British law. Pet. App. 4a-5a; Gov't C.A. Br. 4.

At the same time, petitioner and her daughter, who was Londoño's former wife, initiated an action in the Crown Office Division of the High Court of Justice in Great Britain to discharge the 1990 restraining order issued by the Queen's Bench Division. They argued, among other things, that the restraining order could not remain in place pending a civil (as distinguished from a criminal) forfeiture proceeding in this country. Pet. App. 5a; Gov't C.A. Br. 4.

The district court deferred ruling on petitioner's motion to dismiss the forfeiture complaint pending resolution of the British action. In the meantime, the court issued a preliminary injunction prohibiting petitioner from transferring the funds, except for the release of $100,000 for petitioner's legal expenses. Pet. App. 5a; Gov't C.A. Br. 4-5.

On March 18, 1994, the British High Court upheld the 1990 restraining order. Pet. App. 5a; Gov't C.A. Br. 5. The High Court concluded that, "although now based on the civil proceedings in New York, the order will remain in force." Pet. App. 4c.

3. The district court denied petitioner's motion to dismiss the forfeiture action for lack of *in rem* jurisdiction. Pet. App. 1c-10c. The court determined that it had subject-matter jurisdiction over the forfeiture action under 28 U.S.C. 1355, and that venue was proper under the same statute. *Id.* at 5c-6c, 9c. It further

ruled that "[i]n rem jurisdiction over property in a foreign country exists if there is a seizure of the property that gives the court constructive control over the property, and if the seizure satisfies the traditional concerns of jurisdiction, namely enforceability of the judgment and reasonable probability of notice to the parties interested in the property." *Id.* at 9c. Applying that test, the court held that the "[s]eizure of the accounts in Great Britain with the assistance of the British government gave [the] court constructive control over the defendant funds." *Ibid.* It also found that the High Court's decision in 1994 continuing the restraining order "gives assurance that a judgment of forfeiture issued by this court would be enforced in England." *Id.* at 9c-10c.

After her motion to dismiss was denied, petitioner failed to answer interrogatories and to produce documents as required by a court order. The government moved for summary judgment on the ground that petitioner was collaterally estopped by a related action from contesting the issues of probable cause and innocent ownership of the funds. Petitioner did not oppose the government's motion. On May 25, 1994, the district court granted summary judgment for the government and ordered forfeiture of the funds under 18 U.S.C 981(a)(1)(A) and 21 U.S.C. 881(a)(6). Pet. App. 5a-6a; Gov't C.A. Br. 5-7.

4. The court of appeals affirmed. Pet. App. 1a-14a. It rejected the government's argument that, as a result of 1992 amendments to 28 U.S.C. 1355, the district court did not need actual or constructive control of the *res* to assert *in rem* jurisdiction. *Id.* at 9a-11a. The court of appeals held, however, that the district court had constructive control over the funds in the London bank accounts. *Id.* at 11a-14a. The court of

appeals explained that, although the United Kingdom did not have a "binding obligation" to turn over the funds to the United States, "the district court correctly determined that it had constructive control of the funds by virtue of the demonstrated cooperation of the British government." *Id.* at 13a. The court of appeals agreed with the district court that "the United Kingdom acted essentially as an agent of the United States for purposes of this forfeiture action" because "[e]very action of the British law enforcement officials has been in direct response to requests from federal authorities." *Ibid.* The court of appeals noted that, "in at least two other separate proceedings, the United Kingdom has returned funds to the United States after registering and enforcing decrees of forfeiture entered by a district court." *Ibid.* The court declined to "delineate the precise scope of what will constitute constructive control in future cases." *Id.* at 14a. Instead, it concluded that in this case "the government has met its burden of demonstrating that the British government will turn over at least a portion of the seized funds to the United States, thereby vesting the district court with the requisite constructive control over the funds." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 10-16) that the district court lacked *in rem* jurisdiction over the funds in the London bank accounts because it lacked constructive control of the *res*. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Indeed, petitioner does not cite any other published decision by a federal court addressing

what constitutes constructive control of a *res* located in a foreign country under 28 U.S.C. 1355. Moreover, the court of appeals expressly refrained from making any broad pronouncements on that subject. Further review is therefore unwarranted.

This Court has long recognized that jurisdiction in civil forfeiture proceedings, as in all *in rem* actions, is based on the court's control of the *res*. See, *e.g.*, *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 682-684 (1974); *United States* v. *United States Coin & Currency*, 401 U.S. 715, 719-720 (1971); *Pennington* v. *Fourth National Bank*, 243 U.S. 269 (1917). The Court has made clear that either actual or constructive control of the *res* suffices to confer jurisdiction. See *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 503 (1993) (citing *The Brig Ann*, 13 U.S. (9 Cranch) 289, 291 (1815)); *Republic National Bank* v. *United States*, 506 U.S. 80, 87 (1992). The Court has explained that the *res* "is actually within [the court's] possession, when it is submitted to the process of the court; it is constructively so, when, by a seizure, it is held, to ascertain and enforce a right or forfeiture which can alone be decided by a judicial decree *in rem*." *The Brig Ann*, 13 U.S. (9 Cranch) at 291.

The court of appeals correctly held in this case that the district court had constructive control over the funds that the government sought to forfeit. Pet. App. 13a-14a. The British authorities, at the request of the United States, have seized the funds and are holding them for disposition in light of the outcome of this case. They obtained a restraining order from the Queen's Bench Division preventing transfer of the funds; they attached the funds by serving the

complaint and the arrest warrant *in rem* issued by the court in this case on the banks holding the funds; and the Crown Office Division upheld the restraining order "based on the civil proceedings in New York." *Id.* at 4c. The district court properly found that those circumstances provide "assurance that [the] judgment of forfeiture issued [in this case] would be enforced in England." *Id.* at 9c-10c.

Petitioner contends (Pet. 10, 15) that the court of appeals erred by relying on the government's representation on appeal that, in two prior cases, the United Kingdom has given funds in that country to the United States under forfeiture orders entered in this country. Petitioner argues (Pet. 15) that the government should have obtained "written assurance from the British government" that it would hand over the seized funds.

Petitioner's argument lacks merit. She cites no legal support for restricting the manner in which the government proves that a foreign nation intends to cooperate in a domestic forfeiture proceeding, and the argument cannot be squared with the Executive Branch's discretion in conducting foreign affairs. See *Sale* v. *Haitian Centers Council, Inc.*, 113 S. Ct. 2549, 2567 (1993) (citing *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)); cf. 46 U.S.C. App. 1903(c)(1) (in prosecution for maritime drug trafficking, government may prove foreign country's consent to United States' exercise of jurisdiction over vessel "by certification of the Secretary of State or the Secretary's designee"). Nor does petitioner suggest that the government's representation to the court of appeals was false or misleading; she does not assert, for example, that there were other cases in which the British government has declined

to hand over funds forfeited under an order entered in this country. Finally, even if the court of appeals erred by relying on the government's representation on appeal, the error was harmless, because the district court did not rely on any such representation in holding that it had constructive control over the *res*.

Petitioner also contends (Pet. 16) that the district court lacked *in rem* jurisdiction over any portion of the forfeited funds that the United Kingdom retains. That contention does not warrant further review. Petitioner does not challenge the court of appeals' determination that the amount of funds to be turned over "will depend on negotiations between the two nations." Pet. App. 13a. Thus, it is not clear what, if any, portion of the funds the British government will retain.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

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